A **HARIDAS SUBRAMANIAM & ANOR**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
SULONG MATJERAIE JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: J-05-237-2009]
C 17 NOVEMBER 2011

CRIMINAL LAW: *Penal Code - Section 304(a) - Culpable homicide not amounting to murder - Deceased mercilessly attacked and fatally wounded for no apparent reason - Whether offence serious and required* D *exemplary punishment - Plea of guilty - Whether appellants entitled to a discount - Whether a severe deterrent sentence should be imposed - Public consideration - Sentence to reflect gravity of offence - Whether High Court Judge correct in imposing on each appellant a term of twenty years' imprisonment*

E ***CRIMINAL PROCEDURE:*** *Sentence - Appeal against - Culpable homicide not amounting to murder - Penal Code, s. 304(a) - Deceased mercilessly attacked and fatally wounded for no apparent reason - Whether offence serious and required exemplary punishment - Plea of guilty -* F *Whether appellants entitled to a discount - Whether a severe deterrent sentence should be imposed - Public consideration - Sentence to reflect gravity of offence - Whether High Court Judge correct in imposing on each appellant a term of twenty years' imprisonment*

The appellants were jointly charged under an amended charge of G s. 304(a) of the Penal Code read together with s. 34 of the same. The facts showed that the appellants had attacked the deceased who was fast asleep on a reclining stool at a Mobil Petrol station, dragged him into a motorcar, inflicted fatal incised wounds on the deceased and then left him to die in an estate. The appellants H pleaded guilty. The High Court judge sentenced each of the appellants to twenty years imprisonment. Aggrieved, the appellants appealed against the sentences imposed on them.

Held (dismissing the appeals; affirming sentences imposed on I **each of the appellants)**
Per Malik Ishak JCA:

(1) The offence committed by the appellants was serious and required an exemplary punishment. For no rhyme or reason,

both the appellants mercilessly attacked the deceased and inflicted fatal wounds on the deceased. It was a senseless killing and the High Court judge was correct when he said that the offence could not be forgiven. (para 13)

(2) There was no motive for killing the deceased. Nothing was stolen from the petrol station. Both the appellants seemed to enjoy killing the deceased. The deceased had no chance to survive. He was left alone, seriously injured in pitch darkness in the said estate to die without immediate medical care. His decomposed body was left to rot between five to ten days before it was found. He must have suffered and died in excruciating pain. (para 14)

(3) Deterrence assumes an important role in stamping out senseless killing of an innocent victim like the deceased. Indeed, the sentence meted out was not only to deter the appellants but also to dissuade others in the future from committing offences of a similar nature. Pleading guilty to the amended charge at first opportunity should not entitle the appellants to any discount. It must be made clear that crime does not pay and the only way for this court to send this message across was by imposing a severe deterrent sentence. (paras 16 & 18)

(4) The High Court Judge was correct when he preferred to impose on each appellant a term of imprisonment of twenty years without imposing a fine as well. His Lordship had been magnanimous. The public interest consideration was evidenced by such an amendment which enhanced the punishment for an offence under s. 304(a) of the Penal Code. (para 21)

(5) There were no extenuating circumstances to be considered in favour of both the appellants. It is in the public interest that the sentence should reflect the gravity of the offence. This court could not be lenient to both the appellants as it would encourage them to commit the same crime in the near future. (para 25)

Bahasa Malaysia *Translation of Headnote*

Perayu-perayu dituduh bersama di bawah pertuduhan dipinda s. 304(a) Kanun Keseksaan dibaca bersama dengan s. 34 yang sama. Fakta-fakta menunjukkan bahawa perayu-perayu telah menyerang simati yang sedang tertidur di atas satu bangku

A berbaring di stesyen Mobil Petrol, telah mengheretnya ke sebuah kereta, telah mengenakan luka-luka bertakuk yang membawa maut ke atas simati dan kemudiannya telah membiarkannya mati di dalam sebuah estet. Perayu-perayu mengaku bersalah. Hakim Mahkamah Tinggi telah memberi hukuman dua puluh tahun penjara kepada
B setiap perayu. Terkilan, perayu-perayu merayu terhadap hukuman-hukuman yang dikenakan ke atas mereka.

Diputuskan (menolak rayuan-rayuan; mengesahkan hukuman yang dikenakan ke atas setiap perayu)
C **Oleh Abdul Malik Ishak HMR:**

(1) Kesalahan yang dilakukan oleh perayu-perayu adalah serius dan memerlukan suatu hukuman mencegah. Tanpa apa-apa sebab, kedua-dua perayu telah tanpa belas kasihan menyerang simati dan mengenakan luka-luka yang membawa maut ke atas simati.
D Ia adalah pembunuhan yang tidak masuk akal dan Hakim Mahkamah Tinggi betul apabila beliau menyatakan bahawa kesalahan itu tidak boleh dimaafkan.

(2) Tiada apa-apa motif untuk membunuh simati. Tiada apa-apa
E yang dicuri dari stesen minyak tersebut. Kedua-dua perayu seolah-olah gemar membunuh simati. Simati tidak mempunyai peluang untuk terus hidup. Simati dibiarkan sendirian, cedera parah dalam kegelapan di dalam estet tersebut untuk mati tanpa pertolongan perubatan segera. Badannya ditinggalkan
F untuk reput untuk lima ke sepuluh hari sebelum simati dijumpai. Simati pasti telah menderita dan mati dalam kesakitan yang amat perit.

(3) Pencegahan memainkan peranan yang penting dalam
G menghapuskan pembunuhan tidak masuk akal seorang mangsa yang tidak bersalah seperti simati. Malah, hukuman yang dikenakan bukan hanya untuk menghalang perayu-perayu tetapi juga untuk menghalang orang lain daripada melakukan kesalahan yang serupa pada masa akan datang. Mengaku
H bersalah terhadap pertuduhan yang dipinda pada peluang pertama tidak melayakkan perayu-perayu untuk apa-apa diskaun. Ia mesti dijelaskan bahawa jenayah tidak membawa apa-apa kebaikan dan satu-satunya cara bagi mahkamah ini menghantar mesej ini adalah dengan mengenakan satu
I hukuman pencegahan teruk.

(4) Hakim Mahkamah Tinggi adalah betul apabila beliau memilih untuk mengenakan ke atas setiap perayu tempoh pemenjaraan dua puluh tahun tanpa mengenakan denda sekali. Beliau terlalu baik hati. Pertimbangan kepentingan awam telah dibuktikan oleh pindaan yang telah meningkatkan hukuman untuk kesalahan di bawah s. 304(a) Kanun Keseksaan.

(5) Tiada keadaan-keadaan yang meringankan untuk dipertimbangkan yang boleh memihak kepada kedua-dua perayu. Ia adalah demi kepentingan awam bahawa hukuman perlu mencerminkan graviti kesalahan itu. Mahkamah ini tidak boleh berlemah lembut kepada kedua-dua perayu kerana ia akan menggalakkan mereka untuk melakukan kesalahan yang sama pada masa akan datang.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Kesavan Baskaran v. PP [2008] 6 CLJ 390 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
PP v. Ismail Loyok [1958] 1 LNS 48 HC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***
PP v. Loo Chang Hock [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263 HC ***(refd)***
PP v. Md Rashid Harun [2000] 3 CLJ 832 HC ***(refd)***
PP v. Soh Soo Yang & Anor [2000] 1 LNS 296 HC ***(refd)***
PP v. Teh Ah Cheng [1976] 1 LNS 116 HC ***(refd)***
Yau Kong Kui v. PP [1989] 1 CLJ 1020; [1989] 2 CLJ (Rep) 718 HC ***(refd)***
Yit Kean Hong v. PP [2005] 4 CLJ 592 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Penal Code, ss. 34, 302, 304(a)

Appellant - Unrepresented
For the respondent/prosecution - Andi Razalijaya A Dadi DPP; AG's Chambers

[Appeal from High Court, Muar; Criminal Trial No: 45-3-2006]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

B **[1]** Both the appellants were jointly charged for the murder of Jumary bin Selamat (NRIC number 560520-71-5233), an offence punishable under s. 302 of the Penal Code read together with s. 34 of the same Code. They both claimed trial. The trial proceeded before the High Court at Muar.

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[2] The prosecution called twelve witnesses. At the close of the prosecution's case after evaluating the evidence on a maximum evaluation basis in accordance with s. 180(1) of the Criminal Procedure Code and in compliance with *Looi Kow Chai & Anor v.* D *PP* [2003] 1 CLJ 734 CA; and *Balachandran v. PP* [2005] 1 CLJ 85, FC, the learned High Court Judge found that the prosecution failed to establish a *prima facie* case of murder against both the appellants. But his Lordship was satisfied that based on the evidence as adduced by the prosecution, the prosecution E succeeded in establishing a *prima facie* case for an offence of culpable homicide not amounting to murder, punishable under s. 304(a) of the Penal Code read together with s. 34 of the same Code. His Lordship amended the charge against both the appellants and that amended charge reads as follows:

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> Bahawa kamu pada 23.12.2003 antara pukul 1.30 pagi dan 7.45 pagi di Ladang Kelapa Sawit Tun Dr. Ismail, Simpang Renggam, di dalam Daerah Kluang, dalam Negeri Johor, dengan niat bersama telah melakukan satu homisid salah yang tidak terjumlah dalam kesalahan membunuh, dengan menyebabkan kematian G Jumary bin Selamat (K/P No: 560520-71-5233) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[3] Based on this amended charge, the learned High Court H Judge called the defence of both the appellants. Now, after the amended charge was read, explained and understood by each of the appellants, each one of them pleaded guilty to the amended charge and understood the nature and consequences of their pleas. They were assisted by their respective counsel. The learned I High Court Judge accepted their pleading guilty to the amended charge and convicted both the appellants accordingly.

[4] After assessing the facts of the case and after taking into account the mitigation of each of the appellants, the learned High Court Judge sentenced each of the appellants to twenty years imprisonment with effect from 21 January 2004. Aggrieved, both the appellants now appealed against the sentences imposed on them.

The Facts Of The Case

[5] On 23 December 2003 at about 1am, Saravanan a/l Paniselvam (PW11) drove a Proton Aeroback motor car from Johor Bahru to go to Kluang in order to collect some monies. Travelling together with him in the said motor car were both the appellants and Thenmoli a/p Argellan (PW12) accompanied by two young children. On arrival at Simpang Renggam at about 3am, the said motor car entered into a Mobil petrol station and PW11 stopped the said motor car there.

[6] Both the appellants alighted from the said motor car and they were seen approaching the petrol station attendant by the name of Jumary bin Selamat (deceased) who was at that time fast asleep on a reclining stool. Without furtherado, both the appellants mercilessly assaulted the deceased and then dragged him inside the said motor car. On the instruction of the second appellant (Rajsegaran a/l Satbrumari), PW11 continued to drive the said motor car until it reached an area of an oil palm estate. On arrival at the scene of the crime and that would be at Ladang Kelapa Sawit Tun Dr. Ismail, Simpang Renggam, PW11 was directed to stop the said motor car at one of the entrances to the said estate as reflected in the photograph marked as exh. P4(1). But the said motor car could not enter the said estate because there were barriers placed across the entrance to the said estate.

[7] Everyone including the deceased got down from the said motor car. After the deceased had alighted from the said motor car, the second appellant held onto the deceased's shirt and the deceased struggled and succeeded to free himself and he then ran towards the direction of the said estate. Both the appellants gave chase and entered inside the compound of the said estate.

[8] Approximately half an hour later, both the appellants returned to the said motor car with their clothes soiled in blood without the deceased. When PW11 asked about the whereabouts

of the deceased, the second appellant replied that the deceased had been tied up in the said estate. All of them then returned to Johor Bahru. PW11 was paid RM50 by the second appellant.

[9] On 3 January 2004 – some twelve days later, an Indonesian worker of the said estate alerted lance corporal Kalaiselvan a/l Machavelu, a police reserve, about the discovery of a decomposed body in the said estate. The decomposed body was in a sorry state of affairs as reflected in the photographs marked as exh. P4 (2, 4,5, 6 and 7). The decomposed body was naked and the trousers were used to tie both legs while the belt was used to tie both hands. The decomposed body was beyond recognition.

[10] The government chemist who headed the DNA forensic unit in Johor Bahru by the name of Baktiar bin Kassim (PW10) gave evidence and his DNA report confirmed that the decomposed body was that of Jumary bin Selamat.

[11] Dr Muhamad Azaini bin Ibrahim (PW9) who conducted the post mortem on the deceased testified that there were five (5) incised wounds on the body of the deceased and the cause of death was listed as "multiple incised wounds". According to the good doctor, all the five (5) incised wounds if taken cumulatively and over a period of time without treatment would cause death. The doctor surmised and was of the opinion that death could possibly occur 5 to 6 hours after the incised wounds were inflicted. The doctor was also of the view that the deceased had died between 5 to 10 days before his decomposed body was found.

Analysis

[12] In assessing the length of the custodial sentence, the learned High Court Judge rightly considered the gravity of the offence committed by both the appellants, the facts that led to the commission of the offence, the presence or absence of any mitigating circumstances, and the sentences that have been imposed by other courts in the past for similar offences in order to determine and gauge the trend of sentencing policy.

[13] It cannot be denied that the offence committed by the appellants is serious and it requires an exemplary punishment. For no rhyme or reason, both the appellants mercilessly attacked the deceased when the latter was still asleep and dragged him into the

said motor car. And when the deceased fled towards the estate, both the appellants gave chase and inflicted five fatal incised wounds on the deceased. It was a senseless killing and the learned High Court Judge was right when he said that the offence cannot be forgiven.

[14] There was no motive for killing the deceased. Nothing was stolen from the petrol station. It seems to us that both the appellants enjoy killing the deceased. The deceased had no chance to survive. He was left alone, seriously injured in pitch darkness in the said estate to die without immediate medical care. And his decomposed body was left to rot between five to ten days before it was found. He must have suffered and died in excruciating pain. The learned High Court Judge lamented that there was no necessity for the deceased to die. We cannot disagree with him on this point.

[15] The learned High Court Judge appreciated the evidence before he sentenced both the appellants. This was what his Lordship said (see pp. 11 to 12 of the appeal record):

> Si mati sebenarnya tidak perlu mati. Ini kerana motif OKT dan rakannya itu bukanlah hendak merompak kerana stesyen minyak tersebut tidak diapa-apakan. Maka apa perlunya OKT dan OKT2 terus memukul simati yang sedang tidur tanpa apa-apa sebab? Apalah yang hendak dirompak dari simati yang hanya merupakan seorang atendan pam minyak? Apa perlunya simati dicolek dan dibawa ke ladang kelapa sawit tersebut? Circumstantial evidence menunjukkan simati telah berjaya ditangkap semula oleh OKT dan OKT2. Simati tidak dibawa kembali tetapi telah disesah dengan parang berkali-kali dan kemudiannya ditinggalkan di situ, di tempat yang sunyi dan di malam yang gelap gelita. Maka apa perlunya simati disesah begitu dan kemudiannya ditinggalkan begitu sahaja dengan kaki dan tangannya diikat? OKT dan OKT2 semestinya tahu bahawa perbuatan mereka itu boleh mendatangkan kematian kepada simati. Akhirnya simati mati akibat kecederaan yang dialami.

[16] Passing sentence according to law is the sole prerogative of the court. It must be in accordance with established judicial principles (*Public Prosecutor v. Jafa bin Daud* [1981] 1 LNS 28). We are of the view that deterrence assumes an important role in stamping out senseless killing of an innocent victim like the deceased. Indeed the sentence meted out is not only to deter the

A appellants but also to dissuade others in the future from committing offences of a similar nature (*Yau Kong Kui v. Public Prosecutor* [1989] 1 CLJ 1020; [1989] 2 CLJ (Rep) 718; and *PP v. Md Rashid Harun* [2000] 3 CLJ 832).

B **[17]** Of course, the main aim of imposing a deterrent sentence is to protect public interest (*Public Prosecutor v. Loo Chang Hock* [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263). The guardians of public interest are the courts (*Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139 FC). And public interest is always C the first and foremost consideration in sentencing (*Public Prosecutor v. Ismail bin Loyok* [1958] 1 LNS 48; and *Public Prosecutor v. Teh Ah Cheng* [1976] 1 LNS 116).

[18] It is our judgment that pleading guilty to the amended D charge at first opportunity should not entitle the appellants to any discount. This is the worst case imaginable. This court must make it clear that crime does not pay and the only way for this court to send this message across is by imposing a severe deterrent sentence. This court speaking through Gopal Sri Ram JCA (later E FCJ) in *Kesavan Baskaran v. PP* [2008] 6 CLJ 390, at p. 397, had this to say:

> Having regard to the way which the crime was planned and the most cruel and brutal fashion it was executed the appellant's plea of guilt in our judgment ought to be given no weight. In short, F on the peculiar facts of this case it does not operate as a mitigating factor.

[19] Nik Hashim JCA (later FCJ) in *Yit Kean Hong v. PP* [2005] 4 CLJ 592, at p. 599, aptly said:

G > A plea of guilt is a mitigating factor (see *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441). It is an accepted rule of practice that an accused should be given credit or discount for pleading guilty (see *Public Prosecutor v. Ravindran & Ors* [1993] 1 MLJ 45). The extent of the reduction on account of a plea of guilty would H be between one-quarter and one-third of what otherwise would have been the sentence (see *Mohamad Abdullah Ang Swee Keng v. Public Prosecutor* [1988] 1 MLJ 167). But it is not a strict rule as the court may refuse to grant any discount in cases where public interest demands a deterrent sentence (see *Zaidon, supra*).

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[20] Abdul Wahab Patail J (now JCA) in *Public Prosecutor v. Soh Soo Yang & Anor* [2000] 1 LNS 296, rightly held that if the public including the victims and their dependents do not feel that justice is done according to the gravity of the crime, then respect for and reliance upon the law will be eroded.

[21] By way of an amendment to s. 304(a) of the Penal Code *vide* Act A1210, the term of imprisonment was increased from 20 years to 30 years with effect from 6 March 2007. The offence here was committed on 23 December 2003, and the learned High Court Judge was correct when he preferred to impose on each appellant a term of imprisonment of twenty (20) years with effect from 21 January 2004 without imposing a fine as well. His Lordship has been magnanimous. In our judgment, the public interest consideration is evidenced by such an amendment which enhances the punishment for an offence under s. 304(a) of the Penal Code.

[22] Be that as it may, we took into account the mitigation of each appellant before we passed the appropriate sentence. Haridas a/l Subramaniam (the first appellant) asked for a lighter sentence. A first offender with an aged mother. Age 29. Has been detained for quite some time. Asked for the sentence to be reduced.

[23] The second appellant also prayed for a light sentence. He said that his father had passed away about three years ago and that he has been detained in prison for the last four months. He said that he has repented and craved for a lighter sentence.

[24] In fixing the appropriate sentence, we took into consideration the following factors:

(a) the nature of the offence;

(b) the prevalence of the offence;

(c) the difficulty of detection; and

(d) the sordid circumstances in which the offence was committed.

[25] The court has the discretion to be lenient and merciful provided there are extenuating circumstances. Here, there are no extenuating circumstances to be considered in favour of both the appellants. It is in the public interest that the sentence should

reflect the gravity of the offence. We cannot be lenient to both the appellants as it would encourage them to commit the same crime in the near future.

[26] For the varied reasons alluded to above, we unanimously dismissed the appeals by both the appellants. The sentences imposed on each of the appellants by the High Court are hereby affirmed. The sentences are to run with effect from 21 February 2004.